IN THE COURT OF APPEALS OF IOWA

No. 9-320 / 98-0674
Filed September 29, 1999

FILED
SEP 29 1999
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONI LOUISE WALLACE,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, E. Richard Meadows, Jr., Judge.

Toni Wallace appeals her conviction for third-degree theft, arguing her guilty plea was not voluntary and intelligent, and was not supported by a factual basis. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Victoria Siegel, County Attorney, and Rose Anne Mefford, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Toni Wallace appeals her conviction for third-degree theft, arguing that her guilty plea was not voluntary and intelligent, and was not supported by a factual basis. We affirm.

Background facts. In May of 1997, Wallace sought a loan from Boatman's Bank of Des Moines. Wallace told the bank that she would be receiving a six million dollar settlement from a lawsuit and wanted to establish a trust. The bank subsequently loaned Wallace $1,200. Wallace immediately sought an additional $5,000 loan, and the bank decided to investigate the status of her lawsuit. When bank officials failed to find evidence of any lawsuit in Wallace's name, they contacted police. Following an investigation, Wallace was charged with second degree theft deception.

Pursuant to a plea bargain, Wallace filed a written plea of guilty to the lesser charge of theft in the third degree. She did not file a motion in arrest of judgment. Wallace was sentenced to an indeterminate two-year term of incarceration, fined $500, and ordered to pay restitution in the amount of the theft. She now appeals.

I. Preservation of error. The State contends that Wallace's failure to file a motion in arrest of judgment precludes her from challenging the adequacy of her plea on appeal.

Generally, a defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude his or her right to assert

such challenge on appeal. *See* Iowa R. Crim. P. 23(3)(a). However, failure by the court to substantially comply with the requirements of I. R. Crim. P. 8(2)(d) can reinstate a defendant's right to appeal his or her plea. *See, e.g., State v. Oldham*, 515 N.W.2d 44, 46 (Iowa 1994); *State v. Kirchoff*, 452 N.W.2d 801, 803 (Iowa 1990); *State v. Glenn*, 505 N.W.2d 818, 819 (Iowa App. 1993). I. R. Crim. P. 8(2)(d) provides that:

> The court shall inform the defendant that any challenges to a plea of guilty based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment *and that failure to so raise such challenges shall preclude the right to assert than appeal.*

(Emphasis added).

Wallace contends that neither the written guilty plea nor the court sufficiently informed her of the consequence of failing to file a motion in arrest of judgment. Wallace's written plea of guilty stated, in relevant part:

> 14. I have also discussed with [my] attorney the rights I have to wait 15 days for sentencing, but I give up that right and have the Court sentence me immediately.
>
> 15. In conjunction with the preceding paragraph, I have discussed with my attorney and understand that to contest the adequacy of my guilty plea, I must do so at least five (5) days prior to sentencing by a motion in arrest of judgment, as provided in rule 23(3), Iowa Rules of Criminal Procedure. I hereby waive that right and again ask that sentence be pronounced immediately.

The in-court colloquy proceeded as follows:

> COURT: Ms. Wallace, since we have technically completed the plea proceedings today . . . I'll give you 15 days between now and sentencing. You've indicated that you understand that you have a right to challenge the plea by filing the Motion in Arrest of Judgment. You

understand that you have the 15 days? You've indicated that you want to be sentenced immediately. Understanding now what the minimum and maximum penalties are, do you still want to be sentenced today?

WALLACE: No sir, I want to be sentenced later.

While Wallace was informed of her right to contest the plea by a motion in arrest of judgment, she was not informed of the consequences as required by the specific language of the rule. At a minimum, we believe that rule 8(2)(d) requires that a defendant be clearly informed of her right to file a motion in arrest of judgment, and that a failure to do so waives a later challenge to the plea. *Accord Oldham*, 515 N.W.2d at 46 (although in-court colloquy alone insufficient, written plea informing defendant that he must file a motion in arrest of judgment if he wished to attack the validity of his plea was sufficient to satisfy 8(2)(d)); *Kirchoff*, 452 N.W.2d at 803 (court's statement that defendant was waiving his right to file a motion in arrest of judgment by seeking immediate sentencing was not sufficient to satisfy rule 8(2)(d) requirements); *State v. Worley*, 297 N.W.2d 368, 370 (Iowa 1980) (8(2)(d) not satisfied where defendant was not informed that he could not challenge his plea on appeal if he failed to move in arrest of judgment). We conclude that the requirements of 8(2)(d) were not substantially satisfied by Wallace's written guilty plea nor the court's colloquy. We will therefore address the merits of Wallace's appeal.

II. Merits. Wallace claims the record does not demonstrate that the elements of the theft by deception offense were established nor that she was fully aware of the

elements. Consequently, she asserts that her plea was not supported by a factual basis and was not entered into voluntarily and intelligently.

Iowa Rule of Criminal Procedure 8(2)(b) directs that the court "shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis." As part of that determination, the court must ensure that the defendant has been informed of the nature of the charge to which the plea is offered. *See* I. R. Crim. P. 8(2)(b)(1). However, rule 8(2)(b) does not establish a litany that must be followed without variation before a guilty plea may be accepted. *Kirchoff*, 452 N.W.2d at 804. Substantial compliance with the rule is all that is required. *Id.* (citation omitted).

A person commits theft by deception when the person: "Obtains the labor or services of another, or a transfer of possession, control, or ownership of the property of another, or the beneficial use of property of another, by deception." Iowa Code § 714.1(3)(1997). Deception, as applied to this case, is defined as: "Promising payment, the delivery of goods, or other performance which the actor does not intend to perform or *knows the actor will not be able to perform.*" Iowa Code § 702.9(5) (1997) (emphasis added). Therefore, the elements which needed to be established in this case were: (1) that Wallace obtained the loan on the basis of false assertions and, (2) at the time the loan was obtained, she either had no intention of repaying the loan or *knew she would not be able to repay the loan. Cf. State v. Hogrefe*, 557 N.W.2d

871, 879 (Iowa 1996) (discussing intent element of theft by deception in a post-dated check case).

After reviewing the record, we find that the following excerpt from Wallace's written plea establishes that she was aware of the elements of the offense:

> 2. I understand the nature of the charges against me and I have read and I understand the Trial Information and the Minutes of Testimony filed herein.

We further find that her written plea establishes a factual basis for the plea:

> 13. As a factual basis for acceptance of FECR005052, the Court should be aware that on or about May 16, 1997, in Wapello County, Iowa, the defendant *deceived victim as to ability to repay a loan* of $1200 and obtained that sum by deception.

(Emphasis added).

Wallace argues that we may not infer that she knew she would not be able to repay the loan from the language in the plea. We disagree. To ascertain a defendant's intent, we may rely upon the facts and circumstances surrounding the act in question, as well as any reasonable inferences to be drawn from those facts and circumstances. *See State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999) (citing *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995). Similarly, we should be able to make the reasonable inference that Wallace knew she would be unable to repay the loan from her own words in the written plea. *Cf. Id.* at 790-92 (no inference could be made where defendant who entered *Alford* plea claimed no memory of the act in question and hence made no admissions regarding intent).

We conclude that Wallace's plea was knowing, voluntary, and supported by a factual basis. Having considered all issues properly before us on appeal, we hereby affirm the conviction and sentence of Toni Wallace.

AFFIRMED.